mental error and used it as an umbrella to preserve the constitutional rights of convicted criminals whose counsel omitted to mention them specifically during the battle in the trial court. *State v. Lucero,* (N. M.) 372 P. 2d (Adv. p. 837); *State v. Varos,* 69 N. M. 19, 363 P. 2d 629; *State v. Webb* 67 N. M. 293, 354 P. 2d 1112.

This Court clearly has jurisdiction to determine whether the federal rights asserted in the state court may be lost by waiver and whether, under the particular circumstances, a waiver has in fact occurred. *Truax v. Corrigan,* 257 U. S. 312; *Parker v. Illinois,* 333 U. S. 571. The ruling of a state court as to waiver of the federal claim is not binding on this Court. *Davis v. Wechsler,* 263 U. S. 22; *Patterson v. Alabama,* 294 U. S. 600, particularly when such a "ruling" can only be inferred from silence or a failure to rule.

Constitutional claims that go to the very essence of a fair trial and which, if proved, would render the conviction constitutionally worthless should not be considered waived or forfeited for any but the most inexcusable of reasons.

A judgment of a state court which renders due process meaningless should be reviewed.

QUESTIONS PRESENTED

I.

The act of the trial court in permitting the prosecution to amend substantially a Criminal Information on the day of petitioner's trial was repugnant to the due process clause of the 14th Amendment.

The act of the trial court in sentencing petitioner to five consecutive terms in the state penitentiary constituted double jeopardy in violation of petitioner's rights guaranteed by the 14th Amendment.

STATEMENT OF THE CASE

By judgment of the District Court of Bernalillo County, New Mexico, entered June 23, 1959, petitioner was convicted of fourteen counts upon a criminal Information charging embezzlement, and sentenced to the penitentiary for a term of not less than five, nor more than fifty years,[1] and fined $1,000.00. Upon appeal to the Supreme Court of New Mexico, this judgment was affirmed. (R. 935). Thereafter, petitioner filed in the state supreme court in turn, two petitions for rehearing. (R. 939, 977). Both of these petitions, the latter as an adjunct to a motion for leave to file, were denied without opinion. (R. 970, 998).

The facts which led to petitioner's conviction are of little importance to a proper determination of this petition. What we are concerned here with is the procedure of the trial court. Yet the picture needs a frame and for that reason the facts will be outlined with considerable brevity.

1. *The Crime:*

Petitioner was the executive secretary of the Associated Plumbing, Heating & Piping Contractors of New Mexico, Inc., a trade association. He was convicted of embezzling some $38,148.49 on

---

[1] The Information, as amended (R. 1), charged embezzlement in fifteen counts. The jury verdict found petitioner guilty on fourteen counts, acquitting him on one (R. 36). The sentence of the trial court (R. 37) was for one to ten years on each of five counts, to run consecutively, plus one to ten years on each of the remaining nine counts, to run concurrently.

various dates between September 13, 1955 and March 12, 1958, while holding such an office, allegedly by depositing checks payable to the Association in its moribund bank account, and then drawing on this account for his personal use.

2. *The Procedure of the Conviction:*

The original Information[2] (R. 1) under which petitioner was arraigned and entered his plea of not-guilty, charged, in count one, embezzlement in the amount of $32,678.99 over an approximate 2½ year period. In addition to this count, petitioner was further charged with fourteen additional counts of embezzling specific sums in various smaller amounts from $200.00 to $500.00, *ten of which counts charged petitioner with converting sums which had been included in count one.* Upon such an Information obviously petitioner could never have been found guilty of both the first count and the ten additional counts. The prosecution would have been called upon to elect. But it was not until the morning of the trial, immediately prior to the selection of the jury, that the prosecution, orally, requested the trial court to amend the Information, which, in effect, eliminated from the sum alleged in the gross count one the sums alleged in the additional ten counts. This was done by reducing the amount of $32,678.99, alleged in count one, to $27,857.27. As amended, the first count still covered *the same period of time*, September 13, 1955 to March 12, 1958, but the ten counts alleging particular embezzlements on specific dates, all included in the above period of time, were totalled in amount and subtracted from the original gross sum. Petitioner objected to this amendment (R. 49) and requested, at least, a continuance. Both were denied. Petitioner's assertions in support of this objection and request did not include a "constitutional ground", be it state or federal.

---

[2] This original Information is set forth in Appendix B.

Upon appeal to the Supreme Court of New Mexico, petitioner urged that the allowance by the trial court of the amendment was an error (R. 764) for the reasons that petitioner was prejudiced thereby, and that the amendment was contrary to the New Mexico statute.* In his arguments to the New Mexico court, petitioner asserted that this amendment subjected him to "double jeopardy" and made reference to authorities which discussed this "constitutional principle", but his argument did not specifically mention the due process clause of the 14th Amendment.

The opinion of the New Mexico court, affirming petitioner's conviction, makes no reference to any federal constitutional right, or issue. Upon the rendition of this opinion, petitioner engaged

---

* The statutory authority in New Mexico permitting amendments to criminal informations reads as follows:

"41-6-37. Defects, variances and amendments. - (1) No indictment or information that charges an offense in accordance with the provisions of section 42-607 [41-6-7] shall be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, mispelling or improper English, or because of the use of sign, symbol, figure or abbreviation, or because of any similar defect, imperfection or omission. The court may at any time cause the indictment, information or bill of particulars to be amended in respect to any such defect, imperfection or omission."

"(2) No variance between those allegations of an indictment, information or bill of particulars, which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be ground for the acquittal of the defendant. The court may at any time cause the indictment, information or bill of particulars to be amended in respect to any such variance, to conform to the evidence."

"(3) If the court is of the opinion that the defendant has been prejudiced in his defense upon the merits by any such defect, imperfection or ommission, or by any such variance the court may because of such defect, imperfection, omission or variance, unless the defendant objects, postpone the trial to be had before the same or another jury, on such terms as the court considers proper. In determining whether the defendant has been prejudiced in his defense upon the merits, the court shall consider all the circumstances of the case and the entire course of the prosecution."

"(4) No appeal, or motion made after verdict, based on any such defect, imperfection, omission or variance shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits."

new counsel, who filed a petition for rehearing which specifically alleged that the allowance of the amendment to the Information by the trial court violated petitioner's right under the 14th Amendment, and, in addition, that the sentence of the court subjected him to double jeopardy, urging that what was involved, if anything, was a continuing offense warranting but one punishment, and not the consecutive sentences imposed. This petition was denied without opinion (R. 970). Petitioner then filed a motion for leave to file a second petition for rehearing, a brief in support of such motion, together with his proposed second petition for rehearing and its supporting brief. In his motion petitioner alleged two matters, viz: that a proper disposition of his case required a ruling from the New Mexico court upon his assertion of federal constitutional rights. Furthermore, he urged that the failure of his trial counsel to assert such a ground for his objection to the amendment in the trial court amounted to inadequate representation, in itself a violation of the 14th Amendment. In his brief in support of his second petition, for rehearing, petitioner elaborated upon these arguments. The motion for leave to file the second petition for rehearing was denied without opinion. (R. 998).

REASONS FOR ALLOWANCE OF THE WRIT

1. The judgment below, while it might be based on state procedural grounds, is nevertheless reviewable by this Court.

2. The issues presented by this petition are of a most fundamental nature and involve matters of a criminal procedure which should have a nationwide application. Since Magna Carta a criminal charge and sentence have repeatedly deserved the scrutiny of courts in the English speaking world. Errors committed in either instance have consistently vitiated criminal convictions. These are not mere technicalities of jurisprudence, these are rights for which men would dispose governments.

ARGUMENT
AMPLIFYING THE REASONS STATED ABOVE

A. *Jurisdiction*

New Mexico has no statute or code prescribing conditions or restrictions upon the right of appellate review by its supreme court, but that court does have a Rule of procedure which provides as follows:

> "Rule 20—Reserving Questions for Review—
>
> 1. None but jurisdictional questions shall be first raised in the Supreme Court."

Not surprisingly, however, a court which so "rules" does not consistently adhere to the Rule. In New Mexico it appears to have been ignored as often as it has been observed. With no hesitancy it can be stated that in New Mexico, if its highest court desires to ponder and dispose of an issue, it will do so, regardless of whether counsel below has specifically brought the problem to the attention of the trial court, or even briefed the matter upon appeal. In this regard New Mexico is not unique and the doctrine throughout the land is commonly known as "fundamental error." In other words, appellate courts have the inherent power to correct substantial errors occurring during a trial even thought not directly raised, " . . . if the court deems there is good reason to do so." *Langnes v. Green*, 282 U. S. 531; *Hormel v. Helvering*, 312 U.S. 552.

> "'In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.'

States v. Atkinson, 297 U. S. 157, 160, 56 S.Ct. 391, 392, 80 L. Ed. 555."

Silber v. United States,
82 S.Ct. 1288

The basic error urged upon this Court is that petitioner was not afforded procedural due process. New Mexico has held that its lack can render a conviction fatally defective, even though the error was not preserved in the trial court. *State v. Webb*, 67 N.M. 293, 354 P.2d 1112, makes this observation:

"The attorney general contends with great vigor that the appellant failed to properly preserve the claimed error, and that therefore, the court is without jurisdiction to hear the case. However, the attack is on the judgment as being inherently and fatally defective for *lack of due process*, certainly a fundamental right, and we therefore are of the opinion that the same should be disposed of on its merits. See Mitchell v. Allison, 1949, 54 N.M. 56, 213 P.2nd 231; State v. Garcia, 1942, 46 N.M. 302, 128 P.2d 459, and Candelaria v. Gutierrez, 1924, 30 N.M. 195, 230 P. 436." (emphasis supplied)

The most recent expression from New Mexico of this attitude is *State v. Lucero*, 372 P.2d (Adv. p. 837) where it was said that review of fundamental error is discretionary with the court.

So this petition appears to be within the cloak of *Williams v. Georgia*, 349 U.S. 375:

"A state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power. The principle is clear enough. But the unique aspects of the never-ending new cases that arise require its

> individual application to particular circumstances. Thus, we would have a different question from that before us if the trial court had no power to consider Williams' constitutional objection at the belated time he raised it. But, where a State allows questions of this sort to be raised at a late stage and be determined by its courts *as a matter of discretion*, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner." (emphasis supplied)

New Mexico says that review is discretionary. It therefore follows under *Williams* that a refusal of the state court to exercise such discretion and pass upon constitutional questions does not foreclose a litigant, as a matter of law, from this Court's consideration.

Furthermore, these questions were presented to the New Mexico court, albeit by petitions for rehearing. They are not spring as a surprise here. These petitions were denied, but as to the reasons underlying the denials, we can only speculate. Were they denied because the court below considered them to be without merit? Was the discretion exercised in this case, or were they denied because the procedural rule heretofore set forth? If denied on the "merits", there is no question but that petitioner has the authority to present them to this Court for its disposition. Of course, his standing here is purely a matter of grace, but in the exercise of this grace should this Court speculate, to the detriment of the petitioner? Under *Williams v. Georgia* (supra) and the later decision, petitioner submits that the prior decisions of this Court, as appears to be the prior practice in New Mexico, warrant a holding here that, if there be speculation, the unknown should be resolved in plaintiff's favor and jurisdiction taken. Whilethe petition

does not present a situation as extreme as was present in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U. S. 673, petitioner's plea would appear to be consistent with this Court's remarks in that case. Certainly, this Court's jurisdiction of constitutional issues should not depend solely upon the discretion of the court sitting in New Mexico. Federal rights are entitled to a firmer and more consistent foundation.

B. *The Constitutional Issues*

(a) The Amendment to the Information:

Petitioner's sentence, which can total fifty years, and his fine of $1,000.00, are both subject to the test of the due process clause of the 14th Amendment. Charging a crime by Information, at least those crimes which amount to felonies, was unknown to the common law. In New Mexico, action by a grand jury was required until by a 1925 constitutional amendment the alternative procedure of charging by Information was permitted.[4] Some four score years ago, this Court considered whether this substitution of an information for an indictment was itself constitutional. *Hurtado v. California*, 110 U.S. 517. Justice Matthew's opinion in that case reveals considerable study. In some 42 pages of the official report, he made it clear that the procedure to be followed by a state in charging one of its citizens was of concern at the time of Magna Carta. Henceforth the soveteign was to be limited by the law of the land. The criminal procedure involved here, or its non-observance, has been of concern to the people for over seven hundred years.

With this in mind, petitioner asserts that the procedure followed by New Mexico in instituting these charges against him was fatally defective—the Information upon which he was forced to trial over his objection should never have been so blithely amended.

---

[4] New Mexico Constitution, Article 2, Sec. 14.

As originally filed, and under which he was arraigned, petitioner was charged with embezzling a gross sum of some $32,000.00 over a period of approximately 2½ years. Conviction on this count carried a punishment of from one to ten years. The prosecution was not satisfied. Additional charges were lodged, ten of which specified particular acts of embezzlement pertaining to specific sums of money, but all included within the gross sum and time alleged in count one. Of course, this was impropert and would have required the state to elect between submitting to the jury the evidence against petitioner under the first count, or that evidence pertinent to the ten additional counts. The prosecution could not do both. This right to compel an election should not be so arbitrarily tossed into the trash bin, as was done by the trial court when it permitted the amendment. That court felt that the amendment was merely one of form. Such a view was also entertained by the New Mexico supreme court, but clearly it is one of substance: "Substance" is capable of but the most vague definitions. But New Mexico, by statute, has advised us with reasonable clarity what it means by "form." This demands some explanation.

Modern criminal procedure has tempered somewhat the strict requirements of the common law and permitted amendments as to *form* in an Information, if the trial court in its discretion feels that the amendment does not prejudice the rights of the accused. Petitioner hopes to make very clear here that he is not arguing that the act of the trial judge was an abuse of its discretion. On the contrary, he is asserting that the amendment allowed was of such a nature as not to be subject to the trial judge's discretion at all. This is where the New Mexico courts committed error—in determining that the amendment was discretionary. This is not the point. Unless authorized, no amendments are permissible. New Mexico has authorized by statute amendments as to form, but as to form only. It has never authorized amendments of substance. In such a case there must be a new Information filed which gives birth

again to the several constitutional and statutory rights of a defendant, such a preliminary hearing, arraignment and the like.

There is no obscurity in the New Mexico statute. It specifies that it is limited to matters of form and then gives examples *in the statute itself*, such as miswriting, misspelling, or improper English or because of the use of sign, symbol, figure or abbreviation, or because of any similar defect, imperfection or omission. The Act then provides that as to *such* defects if prejudice results, the trial should be postponed. This statute does not authorize a New Mexico court to permit an amendment of substance. *State v. Valdez*, 51 N.M. 393, 185 P.2d 977; *State v. Ardorino*, 55 N.M. 161, 228 P.2d 947; *Ex-Parte Bain*, 121 U.S. 1, *Stirone v. U.S.*, 361 U.S. 212. Petitioner had the right to go to trial upon the original Information or have that Information vacated and a new one filed.

The obvious effect of this amendment was to put the accused on trial and subject him to punishment for ten additional offenses. Prior to the amendment he could not have been called upon to defend against both count one and the ten specific counts. His legal defense was absolute. The summary denial of this defense jerked from him a day in court, due process of the most fundamental nature. *U. S. v. Universal Corp.*, 244 U.S. 218. The Supreme Court of New Mexico's description of this act as being a "mere legal nicety" does not square with history nor with precedent.

Many of these matters were considered by the Court at the last Term in *Russell v. United States*, 82 S.Ct. 1038. That opinion recognizes the fundamental principles that must be observed when an individual is charged with a crime, particularly that the defendant must be apprised of the details of the crime and given an opportunity to meet them. Futhermore, the same opinion is very clear that amendments to indictments, however they may be characterized as "form", will not be condoned if in reality they be

amendments of substance. The same restrictions apply to criminal informations.

(b) The sentence of the trial court:

It takes little more than a glance at the Information to determine that petitioner was charged with a series of peculations over a period of time almost covered by the three year statute of limitations. Petitioner received five consecutive sentences, but his alleged embezzling was obviously but one continuous offense for which the law allows but one punishment. The alleged embezzlement was from but one master, the trade association. There was but one criminal impulse. There should be but one punishment.

This record indicates that the prosecution in this case could never make up its mind. But the law directs that when charging an individual with a crime, the prosecution should not toy with him. We got rid of this sort of nonsense years ago. If you charge him generally, you may only so convict, and punish. If you charge specifically, the defendant is at least supposed to know it. The present record is inconsistent with the 14th Amendment.

CONCLUSIONS

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
W. PETER MCATEE
Counsel for Petitioner
420 Marquette, N.W.
Albuquerque, New Mexico

DAVID R. GALLAGHER
420 Marquette, N.W.
Albuquerque, New Mexico
Of Counsel

IN THE

SUPREME COURT OF THE STATE OF NEW MEXICO

No. 6827

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

JOHN A. PEKE,
Defendant-Appellant.

SPIESS & HACKNEY, Albuquerque, for Appellant.

HILTON A. DICKSON, JR., *Attorney General*, BOSTON E. WITT, F. HARLAN FLINT, *Assistant Attorneys General*, for appellee.

CARMODY, *Justice*

Defendant was convicted of embezzlement, and this appeal follows.

The questions raised have to do with (1) the propriety of an amendment to the information; (2) the proof as to entrustment; (3) a claimed variance between the allegations and the proof; (4) alleged failure of proof as to certain counts of the information; (5) the competency of evidence of a claimed collateral ofense; (6) an attack on the testimony of an accountant; and (7) a challenge as to certain jury instructions.

The facts are extremenly complicated; but in order to avoid any more detailed discussion under the various points than is absolutely necessary, we will summiarize the pertinent facts.

Defendant Peke was the executive secretary of the Associated Plumbing, Heating and Piping Contractors of New Mexico, Inc., which will be termed hereafter the "State Association." Also involved is the Associated Plumbing and Heating Contractors of Albuquerque, which we will refer to as the "City Association." In addition, there were other local or district associations throughout New Mexico which cooperated with the State Association. The State Association and Peke had offices in a building owned by the City Association. The State Association had only one bank account, which was authorized by the board of directors, this being in the Albuquerque National Bank, although in 1953 a so-called "convention account" was opened in the American Bank of Carlsbad, New Mexico. It is this latter account that is the source of a large part of the dificulty with which we are concerned.

Peke was not authorized to sign checks on the Albuquerque account; but the signature card of the Carlsbad account discloses that the president in 1953 and defendant Peke were authorized to write checks. Additionally, the Carlsbad account was never authorized by the board of directors, and actually was unknown or not remembered by any of the officials of the State Association except Peke.

The State Association consisted of master plumbers throughout New Mexico, and was designed to promote the general welfare of the trade. In addition to many other activities, it assumed the responsibility of collecting payments from master plumbers for the operation of a trust agreement, having as its name "New Mexico Pipe Trades Welfare Fund," which was for the benefit of journeyman plumbers. The State Association also processed insur-

ance claims under this trust fund. The defendant Peke, on behalf of the State Association, had charge of these activities, attended the meetings of the board of trustees, and typed the minutes. However, the trust maintained a separate bank account, and the defendant was not authorized to write checks on this account. Although the defendant is not charged with embezzling any of the money belonging to the trust, it is of importance, because testimony was received regarding the deposit of certain trust payments directly to the association's account, part of which was supposed to compensate for work done for the trust, and because evidence of an audit of the trust funds was introduced.

Another fund which must be discussed is that known as the "Fixture Stamp Plan," which was a source of considerable revenue. The problem as to this fund is whether it belonged to the State Association or to the Albuquerque City Association, for if it was the latter, then the charge of embezzlement from the State Association cannot be sustained as to many of the counts of the information. Money in the Fixture Stamp Plan account could only be withdrawn by checks signed by J. D. Smith, an accountant, and the defendant Peke, both signatures being required.

The defendant Peke was in charge of the State office and, during the period 1953 to 1958, more or less managed and directed the operation of the State Association, the Fixture Stamp Plan, and, to a lesser extent, the New Mexico Pipe Trades Welfare Fund. Following the discovery of the account in the Carlsbad bank, the account was closed and the defendant was charged with embezzlement. The information was in fifteen counts, charging Peke with embezzling some $38,148.49 in money, being the property of Associated Plumbing, Heating and Piping Contractors of New Mexico. Following an extended trial, the defense rested without putting on any evidence, after making certain motions for a directed verdict, and the jury returned a verdict finding the defendant guilty of

fourteen counts and not guilty as to one count involving the sum of $310.00. The claimed acts of embezzlement consisted of depositing certain checks belonging to the Association in the Carlsbad account and subsequently withdrawing the funds; the depositing of certain other checks in the defendant's own personal account in Albuquerque; and, lastly, the cashing of certain other checks at Franchini Brothers Delicatessen in Albuquerque.

As stated initially, the defendant relies upon several points of reversal, and we will consider them in the order submitted.

The first claimed error is the action of the trial court in permitting an amendment to the information on the morning that the case was set for trial. Count one of the information charged the defendant with the embezzlement of a total of $32,678.99, and, as stated to the trial court by the district attorney, the purpose of the amendment was to reduce the amount of this particular count to $27,857.27, because the original amount included some lesser amounts charged in eight other counts of the information.

Count one charged the embezzlement of a total amount between September 13, 1955, and March 12, 1958, whereas counts 2, 3, 4, 9, 11, 12, 13 and 14 charged embezzlement of specific sums on a definite date within the same period. It is obvious that unless the amendment had been made, the defendant could not have been convicted and sentenced on both count one and the other eight counts, because the latter eight would have been included within count one. See State v. Quintana, 1961, 69 N. M. 51, 364 P.2d 120; and State v. Montano, 1961, 69 N.M. 332, 367 P.2d 95. However, it is equally apparent that if the charge had originally been made as proposed by the amendment, the defendant could not have objected, nor would any more nor any fewer defenses have been available. In essence, the amendment merely particular-

ized the exact amounts charged and eliminated duplication. Considered thusly, the amendment corrected a matter of form only. See 4 Wharton's Criminal Law and Procedures, § 1880. Section 41-6-37, N.M.S.A., 1953 Comp., provides as follows:

"41-6-37. Defects, variances and amendment.—(1) No indictment or information that charges an offense in accordance with the provisions of section 42-607 [41-6-7] shall be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because of any miswriting, misspelling or improper English, or because of the use of sign, symbol, figure or abbreviation, or because of any similar defect, imperfection or omission. The court may at any time cause the indictment, information or bill of particulars to be amended in respect to any such defect, imperfection or omission.

"(2) No variance between those allegations of an indictment, information or bill of particulars, which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be ground for the acquittal of the defendant. The court may at any time cause the indictment, information or bill of particulars to be amended in respect to any such variance, to conform to the evidence.

"(3) If the court is of the opinion that the defendant has been prejudiced in his defense upon the merits by any such defect, imperfection or omission or by any such variance, the court may because of such defect, imperfection, omission or variance, unless the defendant objects, postpone the trial, to be had before the same or another jury, on such terms as the courst considers proper. In determining whether the defendant has been prejudiced in his defense upon the merits, the court shall consider all the circumstances of the case and the entire course of the prosecution.

"(4) No appeal, or motion made after verdict, based on any such defect, imperfection, omission or variance shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits."

Also, § 41-6-38, N.M.S.A., 1953 Comp., provides:

"41-6-28. Misjoinder, multiplicity, duplicity and uncertainty.—(1) No indictment or information shall be invalid or insufficient for any one [1] or more of the following defects merely:

"(a) That there is a misjoinder of the parties defendant.

"(b) That there is a misjoinder of the offenses charged.

"(c) That there is duplicity therein.

"(d) That any uncertainty exists therein, provided it charges an offense in accordance with section 42-607 [41-6-7].

"(2) If the court is of the opinion that the defects stated in subsection 1, clauses (a), (b) and (c) or any of them exist in any indictment or information it may order the district attorney to sever such indictment or information into separate indictments or informations or into separate counts, as shall be proper.

"(3) If the court is of the opinion that the defect stated in subsection 1, clause (d) exists in any indictment or information it may order that a bill of particulars be filed in accordance with section 42-608 [41-6-8].

"(4) No appeal, or motion made after verdict, based on any of the defects enumerated in this section shall be sus-

tained unless it is affirmatively shown that the defendant was in fact prejudiced in his defense upon the merits."

[1-2] Duplicity in criminal pleading is the joinder of two or more distinct and separate offenses in the same count. See, 5 Wharton's Criminal Law and Procedure, § 1932. Thus, the amendment merely eliminated the duplicity contained in count one and was proper under the statute.

[3-4] The only claim of any prejudice to the defendant is that it would have been to his advantage to be charged with one count, rather than many. This is not true prejudice as is contemplated by the statutes. The purpose of the above provisions was to eliminate many of the mere technical matters, which in the past have often resulted in a complete miscarriage of justice. The statutory provisions allow the court and jury to determine the issues without becoming enmeshed in an underbrush of legal niceties.

[5] The defendant also argues that he was prejudiced by the amendment in that under the provisions of § 41-6-37 (3), N.M.S.A. 1953 Comp., the court should have granted a continuance. As to this argument, the defendant would substitute in the statute the word "'shall" for the word "may" in the first sentence of subsection three. We decline to so construe the statute. There was no suggestion or request that the trial be postponed because of the amendment, nor any intimation that the defendant would be prejudiced insofar as the presentation of his defense upon the merits. The trial court has a broad discretion in such matters which will not be overturned in the absence of abuse thereof, and we do not feel that the trial court abused its discretion in this instance.

[6] Defendent next claims that, as to nine counts of the information, there was no evidence showing that the defendant was entrusted with any money of the State Association. In essence,

defendant's contention is that he never received any money of the Association in a lawful manner, so that therefore the essential element of entrustment is lacking. In this connection, defendant maintains that inasmuch as he was not authorized to endorse or deposit checks of the State Association, the crime with which he should have been charged, if any, was forgery or obtaining money under false pretenses.

Embezzlement was not a crime at common law. Strictly speaking, the only similar crime at common law was larceny, but this did not include embezzlement, because under the holdings of the English courts, proof of larceny required a showing of trespass, i. e., a felonious violation of possession. As a result, a wrongful conversion following a lawfully acquired possession could not be larceny. In view of this situation, the first embezzlement statute, 39 Geo. III, Ch. 85, was enacted in 1799. The English courts, and some American jurisdictions whose legislatures enacted the rather restrictive language of the English statute, held that the statute must be very strictly construed and drew a sharp distinction between larceny and embezzlement. Other courts in this country, however, in ruling upon their particular statutes, have refused to follow such a strict construction, and have held, in effect, that one may be found guilty of embezzlement even though there may be elements of other crimes involved. See Annotation, 146, A.L.R. 532. At an early time, this court recognized that our territorial statute was broader in scope than those of some other jurisdictions which had been modeled after the statute enacted in England. See Territory v. Maxwell, 1882, 2 N.M. (Gild.) 250, 37 P. 250, which contains a very able discussion of the difference between the statute as then in force in New Mexico and the so-called English type of statute. See, also, State v. Taberner, 1883, 14 R.I. 272; 51 Am.Rep. 382; and Commonwealth v. Ryan, 1892, 155 Mass. 523, 30 N.E. 364, 15 L.R.A. 317, which is one of the outstanding opinions of the late Justice Holmes, written when he was a member

of the Supreme Judicial Court of Massachusetts before his elevation to the Supreme Court of the United States. In State v. Prince, 1948, 52 N.M. 15, 189 P.2d 993, we defined the essential elements of the offense of embezzlement as follows:

> "* * * (a) That the property belonged to some one other than the accused. (b) That the accused occupied a designated fiduciary relationship and that the property came into his possession by reason of his employment or office. (c) That there was a fraudulent intent to deprive the owner of his property. * * *"

Following the decision in State v. Prince, supra, the legislature enacted what now appears as § 40-45-19, N.M.S.A. 1953 Comp., which is our present embezzlement statute, and reads as follows, insofar as material:

> "If any person who shall be entrusted with any property of another shall embezzle or fraudently [sic] convert to his own use or shall secrete with intent to embezzle or fraudently [sic] convert to his own use any such property, he shall be deemed guilty of embezzlement * * *"

We have been called upon to construe this statute in only one case: State v. Konviser, 1953, 57 N.M. 418, 259 P.2d 785. (State v. Seefeldt, 1949, 54 N.M. 24, 212 P.2d 1053, although hereinafter discussed, was based upon the old statute—§ 1543, Code 1915). In the Konviser case, although the conviction was reversed, the court very plainly pointed out that the question of entrustment is a question of fact for the jury:

> "* * *the mere fact that one is an agent, servant or employee does not deny that 'entrustment' may characterize the custody of money or property in his possession as such

agent, servant or employee. The powers of defendant as manager were broad and extensive and the evidence amply supports the jury in believing and finding 'entrustment' characterized defendant's custody of the money and property embezzled. * * *"

In State v. Seefeldt, supra, both possession and title to the property had passed to the defendant, and therefore the offense was not embezzlement. In this case, title to the money or checks remained in the Association until the acts of embezzlement. The cases are therefore clearly distinguishable, and it should also be noted that the Seefeldt case involved one occurrence, while the instant case involved matters occuring over a long period of years.

There is substantial evidence that the defendant for some five years, acted as executive secretary of the State Association and, in such capacity, in effect, operated the business transactions of the Association, including the making of bank deposits and submitting reports to the board of directors. This evidence certainly supports the jury finding of entrustment of the money of the Association.

We have carefully examined the voluminous testimony, and are of the opinion that, as to entrustment, there is substantial evidence warranting the jury's verdict.

Allied to the problem of entrustment is the defendant's claim that, there having been no specific authority shown to have been granted to the defendant to endorse checks for deposit, therefore he was not shown to have been entrusted with the money of the Association. It was shown by the evidence that it was a part of the defendant's duties as executive secretary to receive checks from the members in payment of their dues and other obligations. Even

though there may have been no specific authority granted to the defendant to endorse checks, the record is replete with testimony showing that the defendant had implied authority to deposit checks as a part of carrying on the business of the Association generally, to keep the same operating, and to achieve the purpose for which it was intended. Judging solely from the evidence, if there ever was a person in the position of trust, the defendant in this case occupied one.

The Association's office was operated entirely under the direction and supervision of the defendant Peke. Although the secretarial help kept some semblance of records as to the Fixture Stamp Plan and the New Mexico Pipe Trades Welfare Fund, practically all checks and deposits were handled by the defendant personally. Even the accountant, who had some duties with respect to signing some of the checks and making a type of examination of the books, made what was apparently only a cursory examination of some of the records every five or six months, and in so doing accepted those records that the defendant Peke made available to him. There was no attempt to cross-audit or even cross-check the various funds. As a result, large sums belonging to the Welfare Fund were placed in either the Association's regular bank account, or in the Fixture Stamp Fund account, and thereafter withdrawals from the latter were deposited in the secret account in Carlsbad. Also, other checks belonging either to the Association or to the Fixture Stamp Fund were deposited directly in the Carlsbad account.

[7] The defendant also urges under this attack on the judgment that, the information having charged embezzlement of money, the charge was not proved because it was only shown that, at the most, the defendant took checks. There are cases, most of them quite old, which hold that such a variance is fatal. However, more

recent authority is to the contrary, and in addition, § 41-6-21, N.M.S.A., 1953 Comp., would seem to be a conclusive answer to this contention. The statute reads as follows:

> "In an indictment or information in which it is necessary to make an averment as to money, or bullion or gold-dust, current by custom and usage as money, treasury notes or certificates, bank notes or other securities intended to circulate as money, checks, drafts or bills of exchange, it is sufficient to describe the same or any of them as money, without specifying the particular character, number, denomination, kind, species, or nature thereof."

In view of the provisions of this section, it hardly seems necessary to cite any cases. Under the statute, the charge in the information of the offense of embezzlement of money includes checks. Compare, Stephenson v. State, 1940, 138 Tex.Cr.R. 384, 135 S.W.2d 1005; and Davis v. State, 1925, 196 Ind. 213, 147 N.E. 766. State v. Probert, 1914, 19 N.M. 13, 140 P. 1108, was decided before the enactment of the above statute. The defendant was fully advised of the nature of the charges against him, inasmuch as the bill of particulars specifically alleged that the state would rely upon bank deposits and checks in addition to other testimony, as proof of the offense charged.

[8] The defendant then urges that there is a fatal variance between the allegations of the information as supplemented by the bill of particulars and the proof in the case, with reference to nine of the counts. The basis of this claim of error is that the Fixture Stamp Plan was shown by the evidence to have been originally instituted by the Albuquerque City Association, and that the evidence is not sufficient to show that the Plan during the years of the claimed embezzlement belonged to the State Association.

Many of the witnesses who testified in the case, being former or present officers of the State Association, were somewhat vague in their testimony as to who actually operated the Fixture Stamp Plan. Defendant has quoted the testimony of several of these witnesses, which, if considered alone, would seem to cast doubt upon the ownership of the State Association. However, when all of the testimony is considered, that of each witness in its entirety, and all the facts appearing from the exhibits, which were presented to the jury, we believe that the jury was fully justified in determining that the ownership of the fund was in the State Association. Unless such a determination was made, of course the charge as contained in the nine counts would of necessity fall; and the jury having found to the contrary, on what we deem substantial evidence, we therefore find the point without merit. The cases relied upon by the defendant are not authority under the facts in this case, inasmuch as Territory v. Ortiz, 1895, 8 N.M. 220, 42 P. 61, related to an allegation of ownership by two persons and proof as to ownership in only one, and State v. Probert, supra, involved proof of ownership in a person other than the one alleged in the indictment.

Actually, even if there was a variance, which we do not concede, we doubt if it was such as would impair the substantial rights of the defendant. As was said in England v. United States, 5th Cir. 1949, 174 F.2d 466:

> "Variance as to ownership has not the importance in federal criminal procedure which it had at common law. It now spoils a trial only when the substantial rights of the accused are impaired; and his rights to a correct accusation are generally said to be to have sufficient information as to the charge against him, and protection against being again placed in jeopardy. (Citations.) There was no ignorance on Eng-

land's part of what property he was charged with taking, and we think there is no chance of a second jeopardy for it: * * *"

We agree. The defendant Peke knew what property he was charged with taking, and there was no chance of his being held twice in jeopardy.

[9] The defendant next urges that the court should have instructed a verdict as to four counts of the information, because the state had not proven embezzlement of money belonging to the State Association. These four counts involve four different checks, three for $112.50 and one for $75.00, two of which were made to John Peke, Executive Secretary, one to John Peke, and one to the order of the State Association. Two of these checks were cashed at Franchini Brothers and the other two bear the endorsement of John Peke.

As to this point, the defendant urges that there is no evidence that the dues, for which the checks were initially written, were unpaid, because those who owed the dues were never "dunned" for them. It is believed that the state satisfied its burden as to the embezzlement when it showed that the two checks were cashed and the other two were deposited in the defendant's personal checking account. It was not the responsibility of the state to go forward with proof to show whether or not the dues of the persons involved had been paid. The offense was shown to have been committed with the cashing of the checks, and it makes very little difference whether other funds were used, as defendant seeks to imply, to make up the discrepancy. As a matter of fact, there is no evidence showing either payment or non-payment of these dues. The embezzlement occurred at the moment of the cashing of the checks.

The defendant's next two points relate to the testimony as to the New Mexico Pipe Trades Welfare Fund and the testimony of the accountant as to the audit of this fund. The testimony shows that defendant Peke was the administrator of the fund on behalf of the trustees. This seemed to be a part of his duties as executive secretary of the State Association. Defendant seems to urge that as long as he is not charged with embezzling any funds from the trust fund, that therefore any testimony with respect thereto is inadmissible.

[10] It is obvious that ordinarily when a defendant is on trial for a certain offense, the state cannot offer proof against him showing he has committed other offenses. However, such a rule does not prohibit the admission of evidence which throws light upon the guilt or innocense of the defendant, providing the same is material. See, State v. Bassett, 1921, 26 N.M. 476, 194 P. 867, wherein the rule, together with the reason for the exceptions, is explained. This is particularly true when it is necessary to show a common scheme or intent. See, State v. Bickford, 1914, 28 N.D. 36, 147 N.W. 407; and State v. Wetzel, 1914, 75 W.Va. 7, 83 S.E. 68, Ann.Cas. 1918A, 1074. In Simmons v. State, 1932, 165 Miss. 732, 141 So. 288, it was said:

> "* * * where the transactions are all of a series in a common and interrelated scheme or plan or system, devised and executed by the accused for the one end of embezzling from his employer, then all of the related transactions may be received in evidence. * * *"

See, also, Lewis v. People, 1942, 109 Colo. 89, 123 P.2d 398; and State v. Wolfe, 1936, 64 S.D. 178, 266 N.W. 116, 104 A.L.R. 464; and see notes in 43 L.R.A.,N.S. 774, and 62 L.R.A. 193 at 264.

[11] The defendant urges that the testimony obtained from the accountant who audited th ast fund was inadmissible, because the charge did not inc' ae embezzling from this fund and because all of the primary records were not available in court, and, lastly, because at least a portion of the testimony was (so says the defendant) speculative, because of some doubt as to the amount of the commission or charge that the State Association was entitled to receive from the trust fund for its services in operating it. As to this latter objection, defendant cites State v. Konviser, supra, but we do not deem the same in point as to this issue. In Konviser, supra, almost the entire amount of the shortage was arrived at by what was deemed to be a speculative process on the part of the accountant. In the instant case, the testimony as to the charge was somewhat incidental and did not go to the merits of the entire case. It amounted merely to the auditor's giving his ideas as an expert witness, and the jury were at liberty to believe or disbelieve this testimony under the instructions of the court.

As to the availability of the primary records, it is apparent from an examination of the transcript that the trial court felt that the records were either present in court or were available to counsel upon demand. No showing is made that the defendant ever sought a ruling of the court on this matter, and there is no showing that he was actually prejudiced in any sense because the records were not actually introduced into evidence. See, State v. Schrader, 1958, 64 N.M. 100 324 P.2d 1025.

For clarity, it should be noted that a large part of the funds claimed to be embezzled came initially from the trust fund. However, at the time of embezzlement itself, the funds were the property of the State Association, being in the form of checks out of the trust fund, payable to the State Association. It is for this reason that the evidence as to the machinations of the defendant concerning the trust fund account are particularly pertinent in this

instance. It makes very little difference, except as a showing of the general scheme, where the money initially came from. The defendant Peke was shown by the evidence to have obtained possession of money, or checks, belonging to the State Association, and to have deposited them in the secret account at Carlsbad. This is the offense charged, and the one which the jury felt had been proven.

[12] Defendant then urges that the journal of income and expenditures of the State Association was improperly admitted into evidence. This journal was actually kept by the witness T. D. Smith, who was a registered public accountant, and was received into evidence over the objection of defendant, based upon the fact that it was not prepared under the defendant's direction and supervision. The testimony in the trial court, prior to the admission of the journal into evidence by the witness Smith, was that substantially all of the information contained in the record was received by Smith from the defendant Peke. The record contained merely bank deposits and expenditures, and was taken in part from the check book which was kept by the defendant Peke and in part from the deposit slips which had been prepared by the defendant.

It would appear from the testimony that about all the witness did in preparing the journal was to accept the information given to him by the defendant, the witness stating that he had "all the trust in the world" in the defendant. Even though the entries in the journal were made outside of the presence of the defendant, it appears from the evidence that defendant had a substantial control over the entries made therein. Obviously, the defendant felt damaged by the testimony because it showed the manner in which the defendant was able to cover up the deposits made by him to the Carlsbad account, without there being any showing in the State Association's books of this fact. Even though the books were not kept under the immediate supervision of the defendant, they cer-

tainly were kept under his direction and with his knowledge and actual assent or cooperation. See Hankins v. State, 1927, 115 Neb. 350, 213 N.W. 344; People v. Rowland, 1909, 12 Cal.App. 6, 106 P. 428; and Secor v. State, 1903, 118 Wis. 621, 95 N.W. 942. See, also, Annotation, 154 A.L.R. 279, as to admissibility of corporate books against officers or stockholders.

[13] Defendant lastly seeks a reversal on the basis of the fact that the trial court erred in refusing to grant five requested instructions. It would unduly lengthen this opinion to list the requested instructions and compare the same with those given by the court. It should suffice to say that we have carefully examined the instructions given by the court and are of the opinion that the court's instructions sufficiently covered the law of the case. In such a situation, it was not error on the part of the court to refuse the requested instructions, even though they correctly stated the law. See, Kilpatrick v. State, 1953, 58 N.M. 88, 265 P.2d 978.

From what has been said, we are of the opinion that there is no merit to the various claims of error. We have carefully considered each of the many authorities cited by the defendant, but find that they are not in point in connection with the facts of this case, or are not persuasive.

The judgment will be affirmed. IT IS SO ORDERED.

COMPTON, C. J., and CHAVEZ and MOISE, JJ., concur

NOBLE, J., not participating.

IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISRICT
IN AND FOR THE COUNTY OF BERNALILLO
STATE OF NEW MEXICO

STATE OF NEW MEXICO
vs.
JOHN A. PEKE

The 11th day of September, 1958
No. 14,285
Criminal

INFORMATION

Paul W. Robinson, District Attorney for the Second Judicial District of the State of New Mexico, composed of the counties of Bernalillo, Sandoval and Valencia in said State, accuses John A. Peke of Embezzlement.

27,857.27 Amdt. allowed 6-15-59

and charges that on various and divers dates between September 13, 1955 and March 12, 1958, at the County of Bernalillo, State of New Mexico, the said John A. Peke having been entrusted with the property of another, to wit: money in the approximately sum of $32,670.99, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fradulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT II: That on the 7th day of November, 1957, at the same County and State, the said John A. Peke having been entrusted with the property of another, to wit: money in the sum of $250.00, being the property of Associated Plumbing, Heating

& Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT III: That on the 10th day of January, 1958, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $250.00, being the property of Associated Plumbing, Heating Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT IV: That on the 10th day of February, 1956, at the same County and State, that said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $112.50, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT V: That on the 10th day of March, 1958, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $112.50, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT VI: That on the 27th day of March, 1958, at the same County and State, the said John A. P e, having been entrusted with the property of another, to wit: money in the sum of $112.50, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the

same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT VII: That on the 10th day of April, 1958, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $250.00, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT VIII: That on the 9th day of June, 1958, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $75.00, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT IX: That on the 25th day of July, 1956, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $2,000.00, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT X: That on the 5th day of October, 1956, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $310.00, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT XI: That on the 5th day of October, 1956, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $500.00 being the property of the Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT XII: That on the 10th day of November, 1956, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $500.00, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT XIII: That on the 10th day of November, 1956, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $500.00, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT XIV: That on the 21st day of November, 1956, at the same County and State, the said John A. Peke, having been entrusted with the property of another, to wit: money in the sum of $260.00, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

COUNT XV: That on the 27th day of March, 1958, at the same County and State, the said John A. Peke, having been en-

trusted with the property of another, to wit: money in the sum of $112.50, being the property of Associated Plumbing, Heating & Piping Contractors of New Mexico, did embezzle or fraudulently convert the same to his own use or did secrete the same with intent to embezzle or fraudulently convert the same to his own use.

S / Paul W. Robinson

District Attorney for the Second Judicial District, State of New Mexico